SINGAPORE REPORTS

The Asian Plutus; Owners of Cargo lately laden on board the Ship or Vessel 'Asian Plutus' v Owners and other persons interested in the Ship or Vessel 'Asian Plutus'

HIGH COURT (SINGAPORE) — ADMIRALTY IN REM NO 106 OF 1988
YONG PUNG HOW J
15 MAY 1990

Conflict of Laws — Foreign jurisdiction clause — Plaintiff starting action in Singapore in breach of clause — Whether court should stay action — Procedural disadvantages in Japanese lawsuit — Possibility of connected lawsuits in two different courts — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), s 3(1)(g) — Civil Law Act (Cap 43, 1985 Ed), s 5

Shipping — Bill of lading — Japanese jurisdiction clause — Damage to goods in transit — Plaintiff owner of goods starting action in rem in Singapore against owners of ship

Civil Procedure — Stay of action — Foreign jurisdiction clause in contract — Whether desirable for connected suits to be tried in different jurisdictions

By a bill of lading issued by them, the defendants acknowledged shipment on board their vessel 'Asian Plutus' of cargo for carriage to and delivering at Singapore to the plaintiffs. Among the clauses in the bill of lading it was provided that the bill of lading shall have effect subject to the International Carriage of Goods by Sea Act 1957 of Japan ('the Japanese COGSA'). Also, the contract contained in the bill of lading shall be governed by Japanese law, and any action against the carrier thereunder shall be brought before the Tokyo District Court in Japan.

After the vessel arrived in Singapore, the cargo was found to be seriously damaged. The plaintiffs commenced an action in rem against the vessel. The defendants applied to the court for the plaintiffs' action to be stayed, on the ground that the contract of carriage upon which the plaintiffs' claim was brought expressly provided for any action against the carrier under the contract to be brought in the Tokyo District Court in Japan. The registrar ordered that the plaintiffs' action be stayed. The plaintiffs appealed to the judge-in-chambers against the registrar's order.

Held, dismissing the plaintiffs' appeal:

(1) Although the contract of carriage was governed by the Japanese COGSA, it was not in dispute that the local court had jurisdiction under s 3(1)(g) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) to decide the case.

(2) Prima facie, where there is a foreign jurisdiction clause, effect should be given to it. The parties must be deemed to have agreed to the jurisdiction of the foreign court, presumably with knowledge of how it works and what it can or cannot do. But a court has discretion to refuse an application for a stay if the facts and circumstances of the case are so exceptional as to amount to strong cause and to warrant such a refusal. There was no contention in the present case that the law to be applied should be any other than that chosen by the parties in their contract.

(3) While it may be that a court in Singapore, working in English, will not be precluded from deciding questions of Japanese law, it need hardly be said that it is very much more satisfactory for the law of Japan to be decided by the courts of that country, with a view to ensuring that justice is done.

(4) If the parties have chosen the jurisdiction, the burden of proving that there is strong cause for not granting a stay rests on the plaintiff; where no such choice has been made, the burden of proof (including proving that there is another clearly more appropriate forum) rests on the defendant.

(5) If the action was brought in the Tokyo District Court, there would be communication problems. While this is a factor which has had to be considered in many such cases, the court found it difficult to attribute much weight to it. Similarly, the inconvenience and expense to the plaintiffs in having the case heard in Japan is not a sufficiently telling factor especially when matched against the inconvenience and expense to which the defendants in turn would be subject if the action were allowed to be continued in Singapore.

Cases referred to

1 *The 'Eleftheria'* [1969] 1 Lloyd's Rep 237 (folld)
2 *Austrian Lloyd Steamship Co* v *Gresham Life Assurance Society Ltd* [1903] 1 KB 249 (folld)
3 *Kirchner & Co* v *Gruban* [1909] 1 Ch 413 (folld)
4 *The 'Cap Blanco'* [1913] P 130 (folld)
5 *The 'Athenee'* (1922) 11 Lloyd LR 6 (folld)
6 *The 'Media'* (1931) 41 Lloyd LR 80 (folld)
7 *The 'Fehmarn'* [1957] 2 Lloyd's Rep 551; [1957] 1 Lloyd's Rep 511 (folld)
8 *The 'Adolf Warski'* [1976] 2 Lloyd's Rep 241 (refd)
9 *The 'Makefjell'* [1976] 2 Lloyd's Rep 29 (refd)
10 *Trendtex Trading Corp* v *Credit Suisse* [1980] 3 All ER 721 (refd)
11 *The 'Bernarty'* [1984] 2 Lloyd's Rep 244 (refd)
12 *The 'El Amria'* [1981] 2 Lloyd's Rep 119 (refd)
13 *Amerco Timbers Pte Ltd* v *Chatsworth Timber Corp Pte Ltd* [1977] 2 MLJ 181 (folld)
14 *The 'Atlantic Star'* [1973] 2 Lloyd's Rep 197 (distd)
15 *MacShannon* v *Rockware Glass LH* [1978] AC 795 (distd)
16 *The 'Abidin Daver'* [1984] 1 Lloyd's Rep 339 (distd)
17 *The 'Epar'* [1985] 2 MLJ 3 (distd)
18 *The 'Sidi Bishr'* [1987] 1 Lloyd's Rep 42 (distd)
19 *The 'Spiliada'* [1987] 1 Lloyd's Rep 1 (distd)
20 *The 'Maldive Importer'* [1986] 1 MLJ 12 (refd)

Legislation referred to

Civil Law Act (Cap 43, 1985 Ed) s 5
High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) s 3(1)(g)
International Carriage of Goods by Sea Act 1957 [Japan]

NK Pillai (*Liew Teck Huat* with him) for the plaintiffs.
Loo Dip Seng for the defendants.

Cur Adv Vult

Yong Pung How J: By a bill of lading dated 2 May 1987 issued by them in Osaka, Japan, the defendants acknowledged shipment on board their vessel 'Asian Plutus' at Kobe, Japan, of four steel boxes containing a lathe machine for carriage to and delivery at Singapore to the

plaintiffs. Among the large number of clauses in the bill of lading were the following:

> 2 Clause Paramount. As far as this bill of lading covers the carriage of the goods by water, this bill of lading shall have effect subject to the provisions of the International Carriage of Goods by Sea Act 1957 of Japan, unless it is adjudged that any other legislation of a nature similar to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 compulsorily applies to this bill of lading, in which case it shall have effect subject to the provisions of such legislation, and the said Act or legislation (hereinafter called the Hague Rules legislation) shall be deemed to be incorporated herein. If any provision of this bill of lading is held to be repugnant to any extent to the Hague Rules legislation or any laws, statutes or regulations applicable to the contract evidenced by this bill of lading, such provision shall be null and void to such extent but no further.
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> 3 Governing Law and Jurisdiction. The contract evidenced by or contained in this bill of lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action against the carrier thereunder shall be brought before the Tokyo District Court in Japan.

The vessel arrived in Singapore on 11 May 1987 and the cargo including the steel boxes containing the lathe machine was duly discharged from it into a warehouse to be unstuffed for delivery. The warehouse known as Keppel Block 37 belonged to the Port of Singapore Authority, and was leased to the carrier's agents, Integrated Agency Pte Ltd, and operated by them. Later, while the boxes were still in the possession of the carrier's agents and were being unstuffed, the machine was found to be seriously damaged.

After a lapse of almost one year, the plaintiffs commenced an action in rem against the vessel. The bill of lading showed that the carrier was Interasia Lines Ltd of Japan, and the shipper Yamazen Co Ltd of Osaka, Japan. An exhibit to one of the plaintiffs' affidavits disclosed that Lloyd's Register of Ships (1985-1986) showed the Port of Registry of the vessel as Panama, and Lloyd's List of Shipowners (1983-1984) showed the owners as Fairwind Navigation SA with its principal place of business in Panama City, Republic of Panama. In the writ which was filed on 9 May 1988, the plaintiffs were described as the owners of cargo lately laden on board the ship or vessel 'Asian Plutus', and the defendants as the owners of and other persons interested in the vessel. The writ carried the following indorsement:

> The plaintiffs as the owners of cargo lately laden on board the defendants' ship or vessel 'Asian Plutus' of the Port of Panama, and/or as holders and/or indorsees of the bill of lading whereunder the said cargo was shipped, claim damages from the defendants for loss of and/or damage to the said cargo during the voyage from Kobe, Japan to Singapore in or about the month of May 1987, sustained by reason of the defendants' breach of contract and/or duty and/or negligence in and about the carriage thereof.

On 27 May 1989, the defendants applied to the court for the plaintiffs' action to be stayed, on the ground that the contract of carriage upon which the plaintiffs' claim was brought expressly provided for any action against the carrier under the contract to be brought in the Tokyo District Court in Japan. On 15 September 1989, the registrar ordered that the plaintiffs' action be stayed on condition (1) that the defendants provide security acceptable to all parties for the plaintiffs' action to be brought in the Tokyo District Court in Japan; (2) that the defendants refrain from raising time bar as a defence in the action in the Tokyo District Court, if the plaintiffs commence the action there within four months; and (3) that the defendants appoint a firm of solicitors to accept service of process in the proceedings to be commenced in the Tokyo District Court. The defendants complied with the conditions, and in due course the period for commencing the action in the Tokyo District Court was also extended. On 18 September 1989, the plaintiffs appealed to the judge-in-chambers against the registrar's order.

Although the contract of carriage under this bill of lading is to have effect under the International Carriage of Goods by Sea Act 1957 of Japan ('the Japanese COGSA') to the extent that it is not otherwise affected by the Hague Rules, it is not in dispute that this court has jurisdiction to entertain in Singapore the plaintiffs' claim against the defendants under s 3(1)(g) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) which provides as follows:

> The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
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> (g) any claim for loss or damage to goods carried in a ship;

The question for this court to decide is simply whether the appeal against the Registrar's order that the action be stayed in view of the foreign jurisdiction clause in the bill of lading should be allowed or dismissed.

Except in countries in which a foreign jurisdiction clause is void per se under local legislation, courts have exercised a wide discretion in deciding whether they will hear the parties to an action or whether they will uphold a foreign jurisdiction clause and stay an action. In deciding such questions in the absence of a relevant local law, a Singapore court has recourse to English law and the practice followed by the courts in England, subject only to such modifications and adaptations as may be necessary to suit local circumstances in Singapore. This is by virtue of s 5 of the Civil Law Act (Cap 43, 1985 Ed), the relevant part of which reads as follows:

> 5(1) Subject to this section, in all questions or issues which arise or which have to be decided in Singapore with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to

mercantile law generally, the law with respect to those matters to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any law having force in Singapore.

(3) For the purposes of this section —

(a) the law of England which is to be administered by virtue of subsection (1) shall be subject to such modifications and adaptations as the circumstances of Singapore may require;

A convenient starting point in considering the English law on the subject is the leading judgment of Brandon J in *The 'Eleftheria'*[1] at p 242 in which he summarized what appeared to him to be the principles established by six authorities on this class of case which had been cited to him: *Austrian Lloyd Steamship Co* v *Gresham Life Assurance Society Ltd*;[2] *Kirchner & Co* v *Gruban*;[3] *The 'Cap Blanco'*;[4] *The 'Athenee'*;[5] *The 'Media'*;[6] and *The 'Fehmarn'*.[7] These principles were enunciated by him as follows:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material aspects.
(c) With what country either party is connected, and how closely.
(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

The legal basis for these principles was the presumption that contracts freely entered into must be upheld and given full effect unless their enforcement would be unreasonable and unjust. The manner in which these principles have been applied in England in later cases has not always produced uniform decisions. As extreme examples, in *The 'Adolf Warski'*,[8] the Court of Appeal in applying these principles upheld a decision by Brandon J to refuse a stay when the foreign jurisdiction was Polish; but, on the same day and on very similar facts the same Court of Appeal upheld another decision by Brandon J in *The 'Makefjell'*[9] to grant a stay when the foreign jurisdiction was Norwegian. Notwithstanding the lack of uniformity at times in the results of their application, the principles enunciated by Brandon J in *The 'Eleftheria'*[1] have been consistently applied by English courts in later cases in considering foreign jurisdiction clauses; *Trendtex Trading Corp* v *Credit Suisse*[10] at pp 735-737; *The 'Benarty'*[11] and in particular *The 'El Amria'*.[12]

With only some changes of wording to which I shall refer, Brandon J's views which he stated in *The 'Eleftheria'*[1] were adopted in their entirety by the Court of Appeal in Singapore in *Amerco Timbers Pte Ltd* v *Chatsworth Timber Corp Pte Ltd*.[13] In delivering the judgment of the court on the principles of law on which an application to stay an action on the ground of a foreign jurisdiction clause should be decided in Singapore, Kulasekaram J echoed Brandon J's views as follows:

> The law concerning an application for a stay is clear. Where a plaintiff sues in Singapore in breach of an agreement to submit their dispute to a foreign court, and the defendant applies for a stay, the Singapore Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise:
>
> (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.
> (b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.
> (c) With what country either party is connected and, if so, how closely.
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
> (i) be deprived of security for their claim;
> (ii) be unable to enforce any judgment obtained;
> (iii) be faced with a time bar not applicable here; or
> (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In view of the changes in wording, it is of interest and significance that the Court of Appeal in effect thought fit to clarify what amounts to 'strong cause' by emphasizing

the 'exceptional circumstances' which the plaintiff must show to succeed. This means that prima facie, where there is a foreign jurisdiction clause, effect should be given to it. The parties must be deemed to have agreed to the jurisdiction of the foreign court, presumably with knowledge of how it works and what it can or cannot do. But a court has discretion to refuse an application for a stay if the facts and circumstances of the case are so exceptional as to amount to strong cause and to warrant such a refusal.

In the present case, the nature of the dispute before the court was set out in eight affidavits and the documents exhibited to them. The affidavits unfortunately contained more argument than fact, with which they should have been mainly concerned. Three of them dated 5 July 1989, 22 August 1989 and 11 September 1989 were filed by Mr Yan Chuan Chee, the claims manager of Spica Services (S) Pte Ltd, the Singapore correspondents for The United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd which was the Protection and Indemnity Club in which the defendants' vessel 'Asian Plutus' was entered. Four affidavits dated 27 July 1989, 6 September 1989, 15 September 1989 and 23 October 1989 were filed by Mr Liew Teck Huat, an advocate and solicitor in the employ of the plaintiffs' solicitors; and another affidavit dated 27 November 1989 was filed by Mr Kanapathi Pillai Nirumalan, an advocate and solicitor who described himself in the affidavit as the sole proprietor of the plaintiffs' solicitors' firm and is also known as Mr N K Pillai, the plaintiffs' counsel in the instant case.

Counsel for the plaintiffs accepted that the burden was on him to show exceptional circumstances amounting to strong cause before the plaintiffs could succeed in their appeal against the stay obtained by the defendants. In doing so, he relied on several arguments. First, as his main argument, he contended that the major issues as to liability would revolve around the questions touching on two matters: in whose care, custody and possession was the machine when the damage to it occurred; and what was the direct and proximate cause of the damage. He contended that the damage was incurred in Singapore, 'during the voyage', and not in Japan. Since the plaintiffs had pleaded in the indorsement on the writ that the damage was incurred 'during the voyage from Kobe, Japan to Singapore', he contended that this was a standard form of indorsement and that, in relation to the cargo, the term 'voyage' properly construed extended to cover the whole of the period after the vessel arrived in Singapore until the time the cargo was delivered to consignees. A landing report by Nikkanen Services Pte Ltd, and an outward survey report between the parties, both done in Singapore, indicated that there were in Singapore surveyors, freight forwarders, PSA officials and experts whom the plaintiffs would want to call as witnesses. He contended therefore that the relevant evidence that was available on these matters, including all relevant documentary evidence and the witnesses whom the plaintiffs proposed to call, was almost exclusively to be found in Singapore. If these witnesses had to be taken to Japan, the plaintiffs would suffer substantial inconvenience and expense. The evidence of these witnesses would also have to be interpreted and the documents translated into Japanese, causing further inconveniene and expense.

This was not a completely one-sided argument, however, as the defendants' counsel drew the court's attention to the fact that, apart from the foreign jurisdiction clause providing for the action to be brought in the Tokyo District Court, there was the agreement by the parties that the contract should be governed by Japanese law, in particular the Japanese COGSA. Japanese law would be best administered by the Japanese court. The port of shipment was Kobe, in Japan, the shippers and their forwarders were Japanese. The defendants claimed that, if the dispute continued to be tried in Singapore, they would in their turn have to bring into Singapore Japanese lawyers and several witnesses from Japan, and would suffer similar inconvenience and expense. It was by no means accepted by them, to put it at its weakest, that the damage to the machine had taken place in Singapore. In fact, the plaintiffs themselves had not formally claimed this, because the indorsement to their writ claimed damages from the defendants for loss of and for damage to the cargo 'during the voyage from Kobe, Japan to Singapore', and in this connection the defendants did not accept the stretched definition of 'voyage' contended by the plaintiffs. The damage might have been caused 'pre-shipment', and evidence on this which was available in Japan was called for. There was also other material evidence on the defendants' side which was in Japan, and not in Singapore. The reports prepared in English in Singapore could readily be translated into Japanese.

To begin with, therefore, in considering and determining this appeal, there is for the court the prima facie case for a stay arising from the foreign jurisdiction clause. A party must be bound by a foreign jurisdiction clause which he has agreed to, unless he can show exceptional circumstances amounting to strong cause to the contrary, and thereby discharge the burden placed on him. In *The 'Eleftheria'*,[1] Brandon J said at p 245:

> First, as to the prima facie case for a stay arising from the Greek jurisdiction clause. I think it is essential that the court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement. In this connection, I think that the court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience.

Apart from the dispute over jurisdiction, there was no contention in the present case that the law to be applied should be any other than that chosen by the parties in their contract. A factor which was therefore pressed on me very

strongly by counsel for the defendants was that cl 3 of the bill of lading provided that the contract of carriage is governed by Japanese law which, even on the affidavits and exhibits to them, appears to be not in all material aspects the same as English law. While it may be that a court in Singapore, working in English, will not be precluded from deciding questions of Japanese law on the basis of expert evidence from Japanese lawyers, assisted by competent interpreters, it need hardly be said that it is very much more satisfactory for the law of Japan to be decided by the courts of that country, with a view to ensuring that justice is done. This is so much a matter of common sense that no authority should be necessary.

In this context, I should add that counsel for the plaintiffs referred the court to a string of authorities in which the House of Lords and other English courts have explained the principles to be followed in deciding on the subject of litigation in foreign jurisdictions: *The 'Atlantic Star'*;[14] *MacShannon* v *Rockware Glass Ltd*;[15] *The 'Abidin Daver'*;[16] *The 'Epar'*;[17] *The 'Sidi Bishr'*;[18] and *The 'Spiliada'*.[19] These authorities really deal with the subject of forum non conveniens, rather than the question of whether a court should consider a stay to enforce a foreign jurisdiction clause, and are not of the same relevance in deciding on the issues in the present case, in which the parties have by their contract of carriage agreed beforehand to the jurisdiction of a foreign court. One major difference between the two groups of cases is in the burden of proof. If the parties have chosen the jurisdiction, the burden of proving that there is strong cause for not granting a stay rests on the plaintiff; where no such choice has been made, the burden of proof (including proving that there is another clearly more appropriate forum) rests on the defendant.

Assuming for the time being that the plaintiffs are right in their interpretation of the period of time covered by the term 'voyage', an anomalous problem which they have created for themselves by over-reliance on the use of standard forms and which they will have to resolve when the case goes to trial, the plaintiffs' main argument was based on their contention that the damage occurred in Singapore, and that there are witnesses in Singapore, and documents in the English language. In my opinion, the purely geographical location of the accident can be of relatively minor significance. It does lead inevitably to some connexion with that location, as a large number of such claims would be for damage discovered after discharge, and much of the evidence would be in the country of discharge. But, so far as the transportation of witnesses is concerned, it must be borne in mind that this is an unavoidable problem which may arise in every case where a foreign jurisdiction clause is applied. With the ever improving means of travel between countries, this is not normally a problem which causes insuperable difficulties. In the present case, it appeared to me to be very much a neutral factor. Second, counsel for the plaintiffs contended that the relevant documentary evidence and the oral evidence were essentially based on the English language. If the action was brought in the Tokyo District Court, and conducted in the Japanese language, there would be language communication problems, and much time and effort would be taken up in ensuring that the evidence and the notes of the proceedings were properly and accurately recorded. In view of this, the plaintiffs' position could be unfairly prejudiced. While this is a factor which has had to be considered in many such cases which have come before the courts in England, I find it difficult to attribute much weight to it in a court in the multi-lingual society of Singapore, where from our own experience the use of interpreters in court proceedings can be an established daily routine.

On the contention that the plaintiffs' position could be unfairly prejudiced if legal proceedings had to take place in Japan, affidavit evidence by a Japanese lawyer on certain aspects of Japanese civil procedure was filed by the plaintiffs which purported to show some disadvantages in using a Japanese forum as compared to a forum like Singapore which follows English law and civil procedure. Thus, reference was made to the fact that it generally takes two to three years for an admiralty action to be tried in the Tokyo District Court; that a hearing before this court could be followed by hearings before the Appeal Court, and before the Supreme Court; that this court only hears two or three cases a year involving the Japanese COGSA; that in Japanese proceedings the rules relating to discovery and interrogatories are very restrictive compared to the English rule followed in Singapore; and, although a Japanese court may issue a subpoena to compel the attendance of witnesses in a civil case, this is very rarely done, and the Japanese lawyer who provided the evidence was himself unaware of a case where a subpoena had been issued. In my opinion, where parties have agreed beforehand on the choice of jurisdiction, they must be deemed to have done so with sufficient knowledge of how it works, and what it can and cannot do, and to accept the situation for what it is. If the parties have chosen to submit their disputes to the exclusive jurisdiction of a foreign court, it is difficult to see how either party can in ordinary circumstances complain of the procedure of that court, whether it be that the process of discovery is much restricted or that the process for the issue of subpoenas is not what is followed elsewhere; by choosing the court, they have chosen the procedure.

It may well be that, in very exceptional cases, really serious defects in the procedure of a foreign court, if clearly established by cogent evidence, may justify a Singapore court taking another view of the matter; but this is clearly not the position in the present case, where it is the Tokyo District Court which is concerned, for Japan is a leading maritime country, whose courts must be well versed in such commercial disputes. Even in such exceptional

cases, a Singapore court would need to be cautious about taking the same approach as English courts have been wont to take in the past. With several centuries of legal development and history behind them, and a well deserved reputation for justice which is second to none, English judges and courts have sometimes tended to assume an English court to be the natural forum of choice for foreign litigants. In the process, they have not been averse to rejecting a foreign jurisdiction clause and deciding in favour of exercising an English jurisdiction, even though this has meant that an English court must apply a foreign law. In administering the law of England by virtue of s 5(1) of the Civil Law Act (Cap 43, 1985 Ed), it will often be more appropriate, because of the different circumstances of Singapore, for courts in Singapore to avoid adopting this lofty perspective and to seek instead to apply the law of England with the modifications and adaptions permitted by s 5(3)(a). It is of significance that even in England there has been a discernible movement away from this partiality in recent years. Judicial chauvinism is said by the House of Lords to have been replaced by judicial comity. As an example, in *The 'Atlantic Star'*,[14] Lord Reid said at p 200, in response to a suggestion that England was a very good place for a foreign party to go forum shopping:

> It is said that the right of access to the Queen's Court must not be lightly refused. In the present case Lord Denning MR said:
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> 'No one who comes to these courts asking for justice should come in vain ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in both for the quality of the goods and the speed of service.'
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> My Lords, with all respect that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races.

In addition to their claim in the present case, counsel for the plaintiffs drew my attention to the fact that, as the plaintiffs considered that liability for the loss could fall either on the defendants or on their servants or agents, they have also commenced an action in Singapore against the defendants' agents, Integrated Agency Pte Ltd, for breach of duty as bailees and for negligence, in which both the statement of claim and the defence should closely mirror the corresponding pleadings in the present case. The plaintiffs contend, therefore, that there are two actions in Singapore arising out of the same facts, and revolving around the same issues, and requiring investigations and presentation of identical evidence. In the circumstances, if the plaintiffs were forced to institute proceedings in the Tokyo District Court, it would result in a highly undesirable situation of two actions based on the same issues and evidence being tried in two different forums. Since, in exercising its discretion, the court must take into account all the circumstances of the case, this multiplicity of proceedings is a consideration which must also be taken into account. Plaintiffs' counsel cited the case of *The 'El Amria'*,[12] in which the plaintiffs' cargo of spring crop potatoes was carried by the defendants' vessel from Egypt to Liverpool and was found to be in a deteriorated condition on being unloaded. The plaintiffs issued a writ against the defendants claiming damages for breach of contract and for negligence in and about the stowage, custody and care of their potatoes on board the vessel. The defendants having alleged that the deterioration of the cargo had occurred as a result of the unreasonably slow discharge of the cargo, the plaintiffs issued another writ against the Mersey Docks and Harbour Company. This circumstance was considered by Brandon LJ on appeal as one of the subsidiary reasons relied on by the judge in the Admiralty Court for dismissing the defendants' application for a stay, and he said at p 128:

> I agree entirely with the learned judge's view on that matter, but would go rather further than he did in the passage from his judgment quoted above. By that I mean that I do not regard it as merely convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries.

This factor was also alluded to in a Singapore case, *The 'Maldive Importer'*[20] although it does not appear to have been the main reason for the court's decision. In that case, the vessel struck a reef off an island in the Maldives and sank with a total loss of the cargo on board. The plaintiffs who were owners of some of the cargo commenced proceedings against the owners of the vessel, who applied for the proceedings to be stayed on the ground that the parties were bound by a foreign jurisdiction clause in the bills of lading. In refusing a stay, Lai Kew Chai J held that 'it is crystal clear that practically all the evidence is in Singapore with which the transactions to be investigated will have the closest nexus', and that 'the application for a stay should be refused as it was made purely to obtain a procedural advantage which the respondents are not entitled to in all the circumstances'. In doing so, however, he also expressed the view that 'it is clearly desirable that two or more actions, in which many of the same issues fall to be determined, should be tried by the same tribunal'.

The court's observations in *The 'El Amria'*[12] and those in *The 'Maldive Importer'*[20] deserve of course the greatest respect. It is relevant to note, however, on the subject of multiplicity of actions, that in *The 'El Amria'*,[12] the plaintiffs had been induced to bring a similar action against another party the Mersey Docks and Harbour Company by the defensive stand taken by the defendants. In *The 'Maldive Importer'*,[20] because the vessel sank with the total loss of the cargo on board, there were 24 other

admiralty actions arising out of the accident, which had already been commenced in the High Court in Singapore by other cargo interests. In the instant case, however, the other action which has been commenced in the High Court in Singapore has been commenced by the plaintiffs against the servants or agents of the defendants in circumstances in which, on the bare facts which have been made available to this court, it is not possible to be convinced that the action against the servants or agents need have been taken at all. While the existence of more than one action in different jurisdictions will cause difficulties and can be a relevant factor in deciding whether or not to grant a stay, the plaintiffs should be precluded in the present case from using this circumstance to their advantage when it has been brought about by them. It requires little more effort to commence the second action, and to take this circumstance into account in their favour would be to allow the plaintiffs to choose another preferred forum to that previously agreed to by them in entering into the contract of carriage.

Whether to grant a stay or not is a matter for the discretion of the court. I have considered the factors which have been used by the plaintiffs in their attempt to rebut the prima facie case for a stay, and the very lengthy and detailed arguments which have been urged upon me by counsel for the plaintiffs over several days. In my judgment, this was a dispute which the parties had expressly agreed under the bill of lading should be decided by the Tokyo District Court, and decided in accordance with Japanese law. The choice of Japanese law tied to the choice of a Japanese court as the selected forum are strong factors in upholding the jurisdiction clause. The parties are therefore bound by the jurisdiction clause in the bill of lading to which they have agreed unless exceptional circumstances amounting to strong cause to the contrary can be shown. The inconvenience and expense to the plaintiffs in having to transport witnesses to Japan, and having to use the Japanese language instead of English, is not a sufficiently telling factor, especially when matched against the inconvenience and expense to which the defendants in turn would be subject if the action were allowed to be continued in Singapore. While the vessel is shown by the plaintiffs to have been owned some two or three years before the accident by a Panamanian entity, with its principal place of business in Panama City, the carriers and the shippers were Japanese; on the other hand, the plaintiffs have not proved that they themselves have any real connection with Singapore, and even all five of their affidavits were filed by their solicitors. Neither has it been seriously suggested, as in *The 'Maldive Importer'*,[20] that the defendants do not genuinely desire trial in Japan or are only seeking procedural advantages. The existence of another action which has been commenced by the plaintiffs in the High Court in Singapore is in my judgment not of sufficient relevance to affect the prima facie case for a stay. In all the circumstances, I have therefore come to the conclusion that the plaintiffs have not discharged the burden of proof which was placed on them, and have not proved the exceptional circumstances amounting to the strong cause which they must prove if the court is to refuse a stay. Accordingly, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Niru & Co*; *Ang & Partners*.

Reported by *Terence Tan Bian Chye*

Borneo Motors (S) Pte Ltd v William Jacks & Co (S) Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NO 1651 OF 1983
THEAN J
14 MAY 1990

Landlord and Tenant — Payment for utilities — Tenant to pay electricity and water bill — Whether landlord's computation was correct — Tenant seeking to recover amounts overpaid in respect of such bill — Onus of proving that landlord's computation incorrect

Equity — Estoppel — Payment of bills over a long period of time — Whether payer estopped from claiming that bills were incorrect

The plaintiffs were the tenants and the defendants were the landlords of the premises comprising the front portion of the ground of the building complex ('the premises'). These were let by the defendants to the plaintiffs for a term of three years under a lease.

At all material times the Public Utilities Board ('PUB') did not install separate meters for each of the defendants' tenants; two substation meters were installed by PUB to measure consumption of electricity for the whole of the complex, including the premises. There was no separate meter for measuring electricity consumed in the premises and, accordingly, it was agreed that the plaintiffs should install a meter for measuring their own consumption of electricity.

The basis of the plaintiffs' claims is that overpayments were made for utilities under mistakes of fact; they were mistaken as follows: that the bills rendered by the defendants were proper bills, whereas, in fact, they were not, and that they were under a misconception that the units recorded in the meter had to be multiplied five times for the purpose of equating the rates for such units to the rates charged by PUB.

The claim was disputed by the defendants who amongst other things raised the defence of estoppel, ie that the plaintiffs were estopped from alleging that the method or manner of computation of the electricity charges was incorrect.

Held, dismissing the plaintiffs' claim:

(1) The multiplication by a factor of five was to cover two items, which were not otherwise charged to the plaintiffs: water